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Nos. 251 and 252

In the Supreme Court of the United States

OCTOBER TERM, 1957

PANAMA CANAL COMPANY, PETITIONER

v.

GRACE LINE, INC., ET AL.

GRACE LINE, INC., ET AL., CROSS-PETITIONERS

v.

PANAMA CANAL COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PANAMA CANAL COMPANY

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REPLY BRIEF FOR THE PANAMA CANAL COMPANY

Respondents' answering brief containing 196 pages and an Appendix of 50 pages was served on petitioner on March 23, 1958, *i. e.*, ten days before this case was to be reached for argument in regular order. Because of this time factor, we have not been able to analyze and refute every statement and assertion contained in respondents' brief. Checks of that brief,

however, have shown that significant representations of fact and law have been made with a high degree of inaccuracy. We shall limit this reply brief to pointing out as many of those inaccuracies as time has permitted, as well as emphasizing the fundamental errors in respondents' presentation.

I

RESPONDENTS' CONTENTIONS OF TREATY VIOLATION AND OF IMPROPER BOOKKEEPING

The basic problem raised by this case is whether or not the District Court for the Southern District of New York has jurisdiction and authority to compel petitioner to prescribe new tolls, although the Canal Company, in the exercise of the judgment and discretion conferred upon it, has determined that the current rates are proper. Respondents, and to some extent the *amici curiae*, minimize this fundamental problem. Instead, respondents assert repeatedly that petitioner has violated treaty obligations of the United States; and that it has been guilty of bad faith, of engaging in improper business and bookkeeping practices, of paying illegal dividends, and of submitting incomplete reports. These reiterated accusations are without any foundation whatever.

A. PETITIONER HAS NOT VIOLATED THE INTERNATIONAL DUTY OF THE UNITED STATES TO CHARGE JUST AND EQUITABLE RATES FOR THE USE OF THE CANAL

Respondents' brief is replete with the charge that petitioner has flouted the obligation of the United States under the Hay-Pauncefote Treaty to charge "just and equitable" or "reasonable" rates. Significantly, neither the complaint nor respondents' motion

for summary judgment (R. 4–9, 13–40) contains any allegation to that effect. Those documents charge that petitioner has failed to comply with the statutory toll formula and do not make any reference to the Hay-Pauncefoté Treaty or an inherent duty to charge *reasonable*, rather than *statutory*, rates.[1] Nevertheless, respondents now argue that the toll formula of Section 412 was designed to codify the requirement of the Hay-Pauncefote Treaty to charge just and equitable rates, and that our interpretation of the function of the President's approval power would result in the repudiation of international obligations of the United States. Obviously this is not so.

1. The tolls charged by petitioner are just and equitable within the meaning of the Hay-Pauncefote Treaty

According to the position taken by the British Government, the pertinent international obligations of the United States under Article III of the Hay-Pauncefote Treaty (Main Brief, pp. 6–7) are two-fold:—(1) The acceptance of the principle of neutralization implies the duty not to discriminate, and (2) the undertaking that the charges shall be just and equitable means that tolls should be limited to "the amount representing the fair value of the services rendered, *i. e.*, to the interest on the capital expended and the

[1] In our Main Brief, we have shown (at pp. 121–123, 129) that the toll formula, as interpreted by respondents, does not yield a reasonable rate because it makes no allowance for a reasonable return on the investment and the recovery of legitimate expenses.

cost of operation and maintenance of the Canal",[2] or that the tolls should be "established in relation to the capital cost of the canal and the cost of its operation and maintenance".[3]

As we shall demonstrate, Section 412 does not provide for the maximum "just and equitable" charges within this view of the Treaty, but rather for tolls amounting to about two-thirds of the amount allowable under this British view of the Treaty. Indeed, if respondents had their way, they would pay tolls covering only one-half of the charges thus permissible under the Treaty.[4]

The purpose of the 1950 statute was not to provide

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[2] Note from Sir Edward Grey, British Secretary of State for Foreign Affairs, dated November 14, 1912, *Foreign Relations of the United States* (1912), 481, 486.

[3] *Panama Canal Tolls*, Hearings before the Subcommittee of the Committee on Interoceanic Canals, United States Senate, 75th Cong., 1st Sess. on S. 1912, p. 6.

[4] See Appendix A, *infra*, pp. 44–71, setting forth a 1915 opinion of the Attorney General, holding that the Hay-Pauncefote Treaty was not violated by the giving of free transit to American Government vessels; the opinion points out, among other things, that "just and equitable rates" could be far higher than the rates then charged since "it costs the United States Government two or three times as much to transfer a vessel through the Canal as it received for such services" (p. 66). Appendix A also sets forth a 1931 opinion of the Attorney General confirming the 1915 opinion, *infra*, pp. 67–71.

We print these Attorney Generals' opinions in the Appendix because petitioner's brief in this Court stresses, to a very great extent, its alleged rights under the Hay-Pauncefote Treaty. The 1915 opinion is referred to at R. 93 (in the Bureau of the Budget's report to the President on the Organization of the Panama Canal and Panama Railroad Company, which was transmitted by the President to the Speaker of the House of Representatives).

for compensatory tolls, which would have been at the prohibitive rate of $1.40 per net vessel ton, but to provide for tolls ranging from about 95¢ to $1.05 (Main Brief, pp. 14–17, 87–88), *i. e.*, about one-third below the rates permissible under the British construction of the Hay-Pauncefote Treaty.[5] This goal was accomplished by lowering or eliminating some cost elements and by providing for additional revenue. Interest on the Government's investment was decreased from 3 per centum to 2.3 per centum (Main Brief, pp. 14–15). Interest on an item of $115,000,000 representing interest accrued during the construction period, or approximately $2,500,000 a year[6] was waived. This waiver was designed to take account of the defense value of the Canal (R. 111, 166). The free transit of Government vessels was eliminated.[7] This provided additional income of more than $1,000,000 in peacetime.[8] Finally, it was provided that the Canal operations should not bear the entire cost of the Canal Zone Government but that part thereof should be borne by the business activities of the Panama Railroad Company which previously had been exempted from this burden.[9]

These concessions by the United States were gra-

[5] See Appendix A, *infra*, pp. 44–71.

[6] Main Brief, p. 15; R. 163.

[7] Main Brief, p. 15; see Appendix A, *infra*, pp. 44–71.

[8] H. Doc. 351, 84th Cong., 2d Sess., p. 53; H. Doc. 99, 85th Cong., 1st Sess., p. 47. During the Korean hostilities, the tolls collected on Government vessels were much higher. Between July 1, 1951 and June 30, 1954 this item amounted to nearly $13,000,000. R. 60. H. Doc. 234, 83rd Cong., 1st Sess., p. 41.

[9] Main Brief, p. 15.

tuities, and did not constitute a codification of the Treaty obligations. The British Government has been alert in protecting its Treaty rights as shown by its protests against the exemption of vessels engaged in the coastwise trading of the United States which led to the note of Sir Edward Gray (supra, p. 4, fn. 2), and again by the *amicus curiae* brief filed here. Still, as far as we have been able to discover, it did not protest to the United States Government, between 1914 and 1950, that the United States had violated its Treaty obligations by charging the Canal interests at more than the "going" rate, by charging interest on the interest accrued during the construction period, by failing to exact tolls for the transit of United States Government vessels, and by failing to charge the Panama Railway Company a share in the cost of the Canal Zone Government. This acquiescence, extending over a period of thirty-six years, amounts to a practical construction of the Hay-Pauncefote Treaty and to a recognition that by including these items among the costs to be recovered by tolls the United States did not charge more than "the fair value of the services rendered" (*supra*, pp. 3–4).[10]

The statutory toll formula thus does not restate the obligation of the United States under international law to charge "just and equitable" rates, but provides for a lower figure. Moreover, from respondents' viewpoint, the issue involved in this case must be purely a matter of technical statutory interpretation—not of fairness or equity—*viz.*, whether the terms of Section 412 permit the United States to in-

[10] See Appendix A, *infra*, pp. 48, 63–66.

clude the operating deficit of the supporting business activities in the "costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto". The Comptroller General—on whose reading of Section 412 respondents rest—himself concedes that, as a matter of fairness and proper accountancy, this item constitutes a legitimate operating expense of the Canal (which, however, must be ignored according to his reading of the toll formula as it now stands).[11] In short, the charge by petitioner of a true operating expense to the cost of maintaining and operating the Canal plainly does not violate the international duty of the the United States to charge no more than "just and reasonable rates".

2. The Hay-Pauncefote Treaty does not preclude the President from considering policy matters in connection with his approval of the tolls proposed by petitioner

In our Main Brief, we pointed out (at pp. 65–70) that the requirement of Presidential approval of the tolls proposed by petitioner does not constitute an idle gesture, that the President's functions are not limited to those of a supervising cost accountant, but that he may consider policy issues, particularly in the fields of national transportation policy and of foreign rela-

[11] H. Doc. 160, 84th Cong., 1st Sess., pp. 8–9, 14–16 (R. 47, 56–59); H. Doc. 210, 85th Cong., 1st Sess., pp. 2, 7, 16. It will be noted that the Comptroller General strongly urged an amendment of the toll formula in order to permit the inclusion of such a deficit in the computation of the tolls.

Throughout their brief, respondents ignore this significant view of the Comptroller General, while simultaneously stressing his technical and restricted interpretation of Section 412.

tions. Respondents assert that it would constitute a violation of the Hay-Pauncefote Treaty if the President considered any matter other than whether the proposed tolls are within the statutory formula, considered purely from the accounting viewpoint.[12] This, we submit, constitutes a misapprehension of the duties of the United States under the Treaty.

Those obligations, as we have shown *supra,* pp. 3–4, are not to discriminate and to charge just and equitable rates. The President thus may take into consideration national transportation policy, as long as he recognizes the principle of equality of use and, certainly, so long as the rates remain as far below the permissible Treaty level as they are now. Moreover, a promise not to use the Canal as an instrument of national policy does not mean that we are committed to a policy of international irresponsibility. If a change of the toll rates is likely to create an international disturbance or to have an adverse effect on world trade (cf. R. 95), the United States certainly is under a duty not to limit itself to purely accounting problems in the determination of the toll rates. To the contrary, the Treaty does not prohibit this country from responding to its overriding moral obligation to attempt, if possible, to avoid actions with respect to the Canal that might create unsettling political or economic disorder on an international level. The concept of "just and equitable" embraces factors other than purely fiscal or cost-accounting elements.

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[12] The *Amicus Curiae* Brief of the Government of the United Kingdom refers to "national transportation policy and foreign policy" as factors not contemplated by the Treaty (p. 7).

3. The application of the Hay-Pauncefote Treaty is not before Court

Although, as we have just pointed out, the petitioner's view of Section 412 does not, in any way, violate the Hay-Pauncefote Treaty, it is again appropriate to emphasize that the application of the Treaty is not now before the Court. Respondents are American companies and cannot rest on the Treaty as conferring litigable rights upon them (Main Brief, pp. 129–131). The Government of the United Kingdom has not suggested to the Department of State that it believes the Treaty to have been violated, and, if it should do so, the proper forum for resolving the issue, at least initially, would be the forum of diplomacy. The present case was begun by respondents, and carried on, as a domestic litigation turning on Sections 411 and 412 of the Canal Zone Code. At the very best the precise meaning of the Treaty has only a tangential relationship to this domestic litigation—although the very existence of the Treaty does emphasize the significant character of the President's role in the determination of the Canal tolls and does suggest that the problem is not a judicial one.

B. PETITIONER IS NOT GUILTY OF ANY DECEPTIVE PRACTICES OR FLAGRANT VIOLATIONS OF THE STATUTE

Throughout their brief, respondents charge that petitioner has been guilty of concealing its financial situation by ambiguous bookkeeping, and of a defiant disregard of its statutory duties. There is no merit at all to these repeated accusations.

1. Petitioner has not concealed its financial condition

(*a*). In repeatedly asserting that petitioner has "concealed" what it was doing by "ambiguous bookkeeping" (Respondents' Brief, pp. 60*ff*),[13] respondents try to create the impression that there is something sinister and suspicious about the fact that in 1953 petitioner abandoned the practice of the former Panama Railroad Company of allocating administrative and general overhead expense to its various activities, and that, instead, it charged those expenses to the profits of the corporation as a whole.

The fact is that petitioner has given full publicity to this change in accounting practice in its Third Annual Report (R. 176), and has explained it to Con-

[13] This statement is taken from a similar statement in the opinion below which represents one of the several misapprehensions of fact under which that court labored. See, *e. g.*, the statement that the district judge had awarded summary judgment (R. 236), while, actually, he had refused to pass on that motion and had stayed it (R. 202, 205, 207, 212–213); the assertion that petitioner was reincorporated in 1948 under a federal charter in order to assure better financial supervision (R. 237), while actually this reincorporation was required by Section 304 (b) of the Government Corporation Control Act; the claim that the power of approval was reserved to the President in order to protect the American shipping industry (R. 248)—this theory has been repudiated by respondents (Respondents' Brief, p. 121); the failure to recognize that the supporting business activities are not "other ventures" (R. 248-249), but are "essential to the operation of the Canal and the maintenance of [its] employees * * *" (R. 75; Main Brief, p. 10); and the assumption that the appraisal of petitioner's assets had been completed (R. 249), cf. our Main Brief, pp. 180–181.

gress in detail.[14] The explanation for the shift is quite simple and obvious. Accounting practices which could be used for the Panama Railroad Company, which was engaged in a limited number of business activities of a comparable nature, were not adaptable to the Panama Canal Company, having assets twenty times as large,[15] a far larger staff,[16] and engaged in many more activities of a more varied nature. Moreover, advanced accounting practices have shown that the allocation of overhead expenses to the various activities does not constitute a true cost-accounting distribution. Any person able to read a financial statement can understand petitioner's accounting methods. Indeed, by omitting to allocate the general corporate expenses to the several activities and by keeping them in a single account, it has become much easier to discover whether or not administrative and overhead expenses have risen.

(*b*). Respondents also charge that petitioner's report for 1957 contains even less information than the earlier ones and that it is totally inadequate to advise

[14] *Study of the Operations of the Panama Canal Company and the Canal Zone Government.* Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess., pp. 17–18.

[15] Comptroller General's Report for 1952, H. Doc. 207, 83rd Cong., 1st Sess., p. 78.

[16] On June 30, 1951, *i. e.*, the day before the transfer, the Panama Railroad Company employed 579 employees paid at United States rates, and 5,517 employees paid at local rates. On July 1, 1951, the Panama Canal Company had 3,024 United States rate employees, 12,977 paid at local rates. Cf. H. Doc. 336, 82nd Cong., 2d Sess., p. 5, with H. Doc. 234, 83rd Cong., 1st Sess., p. 29.

respondents as to petitioner's affairs (Respondents' Brief, pp. 18, fn. 4, 56). Respondents obviously refer to the interim report issued by petitioner which varies in format and dimensions from the final agency report which will be submitted to Congress. This brief report states expressly:

> It is impossible to include comprehensive coverage of the Company's varied operations and major activities of the Board of Directors in a brief report of this type. We have, therefore, presented here only the highlights of the year's operations and the principal financial reports and operating statistics will follow. More detailed information will be presented in the regular agency report which will be published at a later date.[17]

In view of this specific statement and of the circumstance that an interim report of this type has been issued previously, it is hard to understand how respondents could mistake the 28-page pamphlet for the regular annual report.

(*c*). Of similar inaccuracy is respondent's assertion that, up to 1951, petitioner's supporting business activities had not only fully earned their administrative expenses but also paid substantial dividends, and that they now fail even to meet their administrative expenses—leading to the inference that "some radical change has affected the business activities, that this change has been concealed by its bookkeeping and that the resultant losses have been loaded on tolls" (Respondents' Brief, pp. 21, 65–66).

[17] See also Appendix B, *infra*, pp. 72–73.

The fact is that the net income of the Panama Railroad Company (after administrative expenses) for the fiscal years 1950 and 1951 amounted to $557,778 and $159,371, respectively.[18] Comparable figures for petitioner's fiscal year 1954 appear at R. 179.[19] They show an operating income before general corporate expenses as follows:

Canal and other marine operations	$24,263,841
Allied maritime operations	1,518,020
Supporting service operations[19a]	2,549,197
Total	28,331,058

The General Corporate Expenses consist of:

Net cost of Canal Zone Government	$10,306,079
Interest payable to U. S. Treasury	8,847,255
Administrative and other general expenses	4,957,714
Total	24,171,048

The "supporting service operations" thus were able to pay a very large portion of the *Administrative and General Expense* and still earn a profit comparable to that of the Panama Railroad Company. Petitioner's *General Corporate Expense*, of course, is not comparable with the *Administrative Expense* of the Panama Railroad Company; the latter did not include any portion of the cost of the Canal Zone Government and of the interest payable to the United States, totaling $19,000,000 in 1954.[20]

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[18] H. Doc. 336, 82nd Cong., 2d Sess., p. 4.

[19] The figures for fiscal 1956 are similar; see H. Doc. 99, 85th Cong., 1st Sess., p. 47.

[19a] These operations correspond roughly to the activities formerly operated by the Panama Railroad Company.

[20] The alleged increase of petitioner's administrative expenses thus is either nonexistent or is fully explained by the circumstance that the Panama Canal Company has very substantial corporate expense for which the Panama Railroad Company had no counterpart.

The paper losses of the supporting activities computed by the Comptroller General thus do not result from ambiguous bookkeeping or a deliberate and sinister inflation of petitioner's administrative expenses, but from the stubborn economic fact that these activities are unable to earn enough to foot the bill for any substantial portion of the cost of the Canal Zone Government and the interest payable to the United States.[21] There is neither magic nor chicanery in this outcome. The Panama Railroad Company, with an average annual profit of $1,000,000, would not have been able, either, to shoulder a substantial portion of those expenses (see our Main Brief, p. 15, fn. 35).

What respondents have been doing throughout their brief has been to give a sinister meaning to the obvious, *viz.*, that neither the Panama Railroad Company, nor petitioner's supporting business activities, had the financial capacity to earn much more than $1,000,000 a year, let alone a substantial part of the cost of the Canal Zone Government and of the interest payable to the United States. Hence, the deficit in the supporting activities computed by the Comptroller General was caused by inexorable economic laws, not by ambiguous bookkeeping and concealment.[22] Respond-

[21] We have shown in our Main Brief (pp. 83–84) that it is not feasible substantially to increase the profits of the supporting activities. Any attempt to do so would either price vitally needed facilities out of business, or increase petitioner's direct operation expenses.

[22] Respondents also charge that the payment of surplus funds to the United States Treasury, as required by Section 253, constituted a payment "of large sums to the U. S. Treasury without lawful warrant" (Respondents' Brief, p. 24), and that this payment was in violation of the toll formula (*ibid.*, p. 56,

ents have not tried to explain the plain fact that neither the Bureau of the Budget nor Congress, both well aware of this controversy,[23] have tried to correct petitioner's supposed misdeeds.

2. In any event, the losses of petitioner's business activities constitute legitimate elements of the cost of operating and maintaining the Panama Canal

We have shown in our Main Brief (pp. 84–86) that any losses of petitioner's business activities are recoverable as costs of maintaining and operating the Panama Canal together with the facilities and appurtenances thereto. This view is supported by the legislative findings that the business activities of the Canal are "essential to the operation of the Canal, and the maintenance of employees required in the conduct of the Canal enterprise" (R. 75), and by this Court's recognition that these activities constitute an integral part of the Canal venture. *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401. Obviously, an enterprise such as the Panama Canal, located in the tropics and hundreds of miles from major port installations,

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footnote). Respondents would have the toll formula, as interpreted by them, repeal Section 253 by implication. Repeals by implication, however, are never favored (*United States* v. *Borden Co.*, 308 U. S. 188, 198–199). And this is particularly true where a statute sets forth, as carefully as the 1950 Act, the extent to which it overrides the prior legislation *in pari materia*. Payment of the dividends was made on the insistence of the Bureau of the Budget and of the General Accounting Office (R. 46, 50). The General Accounting Office has reported the dividends paid by petitioner three times without making any objections (R. 46, 50). H. Doc. 465, 84th Cong., 2d Sess., p. 49 and H. Doc. 210, 85th Cong., 1st Sess., p. 44.

[23] Main Brief, pp. 20, 53, 136–138.

requires repair, bunkering, and other terminal installations, as well as commissary, housing, and hotel facilities for its permanent employees and transient official visitors resident in the temperate zone.[24]

(*a*). Respondents seek to overcome these legislative and judicial findings by the semantic device of calling these *essential* activities "collateral" (Respondents' Brief, p. 46), and by overstressing that to some extent these activities serve the armed forces, the general public, and the Republic of Panama; on this basis, respondents assert that the deficit of the supporting activities was substantially due to national defense policy (Respondents' Brief, pp. 46–51, 50).[25] But respondents cannot properly treat the supporting activities as exclusively concerned with non-Canal purposes; obviously, these activities are directly related to the functioning and maintenance of the Canal itself, even though they may partially serve the other purposes as well. And, as we have shown (*supra*, p. 5), the United States waived interest on interest accrued during the construction period, an item amounting to $2,500,000 per annum, in order to compensate petitioner (and, indirectly, the Canal users) for the incidence of defense costs upon the Canal. The

[24] This Court recognized fully that proper attention to the Canal's employees required the operation of seeming marginal activities such as a dairy and hotels (299 U. S. at 408).

[25] The sole support for this assertion is the statement of the Comptroller General that petitioner is employing United States citizens in many positions that could be filled locally (Respondents' Brief, pp. 50–51; R. 56–58). There is nothing to indicate that this personnel policy rests primarily, if at all, upon considerations of national defense.

Canal users plainly are not entitled to a second credit. Respondents have not even attempted to show that the benefits to the general public and the Republic of Panama from the supporting activities contribute to any appreciable extent to their losses.

(*b*). Respondents' second argument is that the term "facilities and appurtenances related thereto" in the toll formula does not refer to *all* the facilities and appurtenances pertaining to the Canal, but only to those which were transferred to petitioner together with the Canal pursuant to Title 2, Section 256 of the Canal Zone Code (Respondents' Brief, pp. 31–33). No reason is given for this limited interpretation of the general words "facilities and appurtenances". Respondents do not, and cannot, explain why the expenses of the facilities and appurtenances transferred in 1951 should have been singled out as a cost item recoverable by tolls, as distinguished from the facilities and appurtenances already belonging to the Panama Railroad Company. As we have pointed out in our Main Brief and *supra*, p. 7, even the Comptroller General believes that the cost of the supporting activities here in question *should* clearly be reflected in the tolls.

Moreover, respondents' interpretation makes the toll formula so cumbersome and complicated that it cannot represent the true Congressional purpose. Chronologically, petitioner's facilities and appurtenances fall into three groups:—those originally operated by the Panama Railroad Company; those transferred to the Panama Railroad Company as of July 1, 1950 by Executive Order 10102 (3 CFR (1950 Supp.) 80) pursuant to the Act of August 12, 1949 (Main

Brief, pp. 157–159); and those transferred as of July 1, 1951, pursuant to the 1950 statute.

The original assets of the Panama Canal Company (when it was called the Panama Railroad Company) consisted roughly of the Railroad, three steamships, harbor terminals, a commissary system, a telephone system, and the Hotel Washington, valued on June 30, 1950 at some $45,000,000 (H. Doc. 336, 82nd Cong., 2d Sess., p. 25).[26] Executive Order 10102 (*supra*, p. 17) transferred to the Panama Railroad Company facilities and appurtenances then valued at about $10,000,000, consisting (among others) of harbor terminals, coal and oil handling plants, certain commissary and railroad facilities, and printing plants (H. Doc. 336, 82nd Cong., 2d Sess., p. 25). The facilities and appurtenances transferred to petitioner in 1951 pursuant to Section 256—the only ones whose losses (according to respondents' theory) are chargeable to the tolls—consisted of the following items:[27]

Locks and appurtenances	$85, 867, 170
Floating equipment	16, 232, 557
Buildings, other structures and equipment	70, 327, 923
Total	172, 427, 650

—about three times as much as the undepreciated value[28] of the Panama Railroad Company. The item "Buildings, other structures, and equipment" includes (among others) employees' housing, electric power system, water system, certain commissary plants and stores, marine repairshops, general storehouses, club-

[26] This figure, as well as the figures on the following pages, do not take account of depreciation.

[27] H. Doc. 207, 83rd Cong., 1st Sess., pp. 81–82.

[28] *Supra*, fn. 26.

houses, a telephone system, motor transportation, and hotels.

Thus, if respondents' interpretation of the toll formula were right, the losses of a large portion of the facilities and appurtenances still would be chargeable to costs. This, however, would cast upon petitioner the burden of determining what appurtenance and facilities historically had belonged to the Panama Railroad Company and which had been transferred to it in 1951. Petitioner would be required not only to split up certain activities, such as the telephone, commissary and hotel operations, but would also be compelled to determine the time when each element of these facilities had been transferred to petitioner (not to mention the problems resulting from replacement).

Such an intent is not easily imputed to Congress, and there appears to be no rational reason why the losses of the marine repair shop, general store, houses, clubhouses and of one hotel should be recoverable through tolls—and those of the marine terminals, marine bunkering facilities, and of another hotel, should not. The answer, we submit, is obvious. Congress never intended to place any such limitation upon the recovery of legitimate business expenses through Canal tolls.

Moreover, as we have emphasized in our Main Brief, the result of respondents' extremely narrow interpretation of the toll formula would be that the United States would have to pay for the deficit of the supporting activities, thus providing for a toll reduction to respondents at the cost of the Government. This, of course, is in complete conflict with

the expressed congressional purpose, *viz,* that the tolls should be raised to 95¢ or $1.00 and that the toll formula should not result in any loss of revenue (Main Brief, pp. 86–88). Respondents suggest that it would not be necessary to appropriate funds to pay for this deficit, because the interest rate could be lowered instead (Respondents' Brief, pp. 138–139). They have not explained why such bookkeeping manipulations would not constitute a loss to the Government which would somehow have to be made up.

(*c*). In any event, it is crystal clear, from what we have said in our Main Brief and in the preceding discussion, that respondents' view of the meaning of the toll formula is neither plainly right nor compelling. We believe on the contrary that petitioner has correctly read Section 412; but the very best that can be said for respondents is that the statute is ambiguous and that they may possibly be right. In such circumstances, they can hardly demand that the courts intervene to compel action by the use of mandatory powers; those powers are to be employed only where the official duty is clear and indisputable. Main Brief, pp. 71 *ff.*

II

RESPONDENTS' CONTENTIONS AS TO JURISDICTION.

In the first part of this reply brief, we have answered certain contentions made by respondents that petitioner has violated international and municipal law and has kept its books and accounts in an improper manner. Here, we shall deal with the jurisdictional issues, the basic issues in the case.

A. INQUIRY INTO JURISDICTION OVER THE SUBJECT MATTER IS NOT PRECLUDED BY THE FILING OF A COMPLAINT FRAMED SO AS TO CONFORM WITH 28 U. S. C. 1331, OR THE WAIVER OF SOVEREIGN IMMUNITY

Respondents make the astonishing assertions that we are precluded from challenging the jurisdiction of the courts over the subject matter because their complaint has been framed in accordance with Form 2 (b) of the Appendix to the Federal Rules of Civil Procedure, and because the courts have jurisdiction over the person of the petitioner (Respondents' Brief, pp. 86–91).

1. The form of the complaint cannot confer jurisdiction over the subject matter

Respondents argue that their complaint has been framed carefully so as to invoke the jurisdiction of the federal courts by pleading a colorable claim under the Constitution, laws, or treaties of the United States, employing the phraseology suggested by Form 2 (b) of the Appendix to the Federal Rules of Civil Procedure; they then claim, invoking the authority of *Bell* v. *Hood,* 327 U. S. 678, that such a complaint cannot be dismissed for a lack of jurisdiction over the subject matter. Obviously, respondents' contention proves too much. If it were true, the motion to dismiss for lack of jurisdiction would be abolished for all practical purposes in the federal courts.

Bell v. *Hood, supra,* holds that where federal jurisdiction is based upon the allegation of a claim arising under the Constitution, laws or treaties of the United States, which is not insubstantial or frivolous on its

face, the jurisdiction of the federal courts cannot be challenged on the ground that the allegations do not state a federal cause of action (327 U. S. at 682–685).[29] The existence *vel non* of a claim for which relief can be granted goes to the merits of the case, and a decision on that issue would be *res judicata* on the parties. *Montana-Dakota Co.* v. *Public Service Co.*, 341 U. S. 246, 249. The rule that the question whether the complaint sets forth a *federal* claim cannot be challenged on motion to dismiss for lack of jurisdiction, however, does not mean that the pleading of a federal claim forecloses an inquiry into *other* jurisdictional defects. Our motion to dismiss was not based on the ground that the complaint simply fails to allege a cause of action, federal or otherwise, but that the courts lack jurisdiction of the subject matter.

2. That the courts may have jurisdiction over petitioner's person has no bearing on the question of whether they have jurisdiction over the subject matter of this litigation

Throughout their brief, respondents stress that petitioner is subject to suit like any private corporation. We have pointed out that a waiver of sovereign immunity goes to the jurisdiction over petitioner's person, and has no bearing on the issue of the courts' jurisdiction over the subject matter (Main Brief, p. 56). Respondents seek to overcome this difficulty by arguing that "we know that the 81st Congress specifically intended by the adoption of the Act of

[29] See the explanation of the opinion in *Bell* v. *Hood*, *supra*, by its author, in *Johnson* v. *Eisentrager*, 339 U. S. 763, 792 (dissenting opinion of Black, *J.*), in which it was made clear that the rule of *Bell* v. *Hood* presupposes the existence of "jurisdiction of subject matter and parties".

July 16, 1949 [excepting petitioner from the coverage of the Federal Tort Claims Act] that it [petitioner] 'should be subject to suits on *all* claims, tort as well as contract, in the *same* manner as any *private* corporation' " (Respondents' Brief, p. 185). The word "should" does not appear in the pertinent legislative history. The pertinent passages in the Committee reports [30] merely explain that, prior to the enactment of the Federal Tort Claims Act, the Panama Railroad Company, then incorporated under the laws of New York, had been subject to suit in the same manner as a private corporation. The Committee reports took the position that many of the detailed provisions of the Federal Tort Claims Act were not adaptable to a corporation engaged in business as a common carrier and operating out of earnings rather than out of appropriated funds. They, therefore, recommended the enactment of 28 U. S. C. 2680 (m), excepting the Panama Railroad Company from the operation of the Tort Claims Act.

The legislative history of this 1949 statute, dealing with the tort liability of the supporting activities (then operated by the Panama Railroad Company), has little relation to the problems connected with the operation and management of the Canal itself, and the determination of the toll charges. Indeed, those parts of the Act of 1950 which deal with petitioner's liability for torts arising from the operation of the

[30] H. Rept. 830, 81st Cong., 1st Sess., pp. 1–2; S. Rept. 167, 81st Cong., 1st Sess., pp. 1–2.

Canal,[31] show that petitioner is not liable like a private corporation for all the torts committed by it. Similarly, the unique provisions of Section 411, providing for a hearing *after* the proposal of new toll charges and for presidential approval, are indicative of a congressional purpose that, so far as rate determinations are concerned, petitioner is not to be assimilated to a private utility. And this Court has recognized that Government corporations cannot be fully and automatically equated with private corporations. *Federal Crop Insurance Corp.* v. *Merrill,* 332 U. S. 380, 383–384. Attention must always be paid to the particular problem and the particular circumstances.

In addition, respondents' insistence that petitioner must be treated in all respects as a private corporation ignores the specific requirements of the Administrative Procedure Act—on which respondents purport to rely (Respondents' Brief, p. 5). Respondents recognize that petitioner is an agency and instrumentality of the United States, and they claim that the failure to propose new tolls constitutes federal agency action (Respondents' Brief, pp. 93, 149, 155). But, according to Section 10 of the Administrative Procedure Act, judicial review of a Government agency's action is not available where precluded by statute, or where the action is of a discretionary nature; judicial review furthermore presupposes standing to sue, and the existence of a court of competent jurisdiction. These statutory requirements, part of which are con-

[31] Canal Zone Code, Title 2, Section 10, as amended, Main Brief, pp. 160–163.

stitutional in nature, can be modified, if at all, only by express enactment (Administrative Procedure Act, Section 12, 5 U. S. C. 1011); they are not relinquished by implication, merely as a result of a waiver of sovereign immunity as to the particular federal agency. It follows that, whatever may be true of private corporations, petitioner's actions cannot be reviewed except in conformity with the requirements of the Administrative Procedure Act.

B. THE NATURE OF THE PRESIDENT'S POWER TO APPROVE TOLLS PROPOSED BY PETITIONER

In our Main Brief, we have shown that petitioner's function in connection with the rate determination constitutes essentially the giving of internal advice to the President, not subject to judicial review or discipline, and that the salient, final, administrative act is the approval of the tolls by the President who has to consider matters quite different from those taken into account by petitioner (Main Brief, pp. 61–70). Respondents seek to belittle the President's role in the statutory plan, and also argue that if our interpretation of the statute were correct it would constitute a violation of the Constitution and the Hay-Pauncefote Treaty[32] (Respondent's Brief, pp. 102–131).

1. The importance of presidential review

Respondents minimize the importance of the Presidential approval requirement of Section 411 because the review clause was barely mentioned in the legislative history of the Act (Respondents' Brief, pp. 104–106). The need for Presidential review of the toll

[32] We have disposed of the last argument, *supra*, pp. 7–8.

rates in the light of national transportation policy, world trade and shipping—indeed, the essential nature of Presidential approval—was stressed at least four times in the legislative history:—twice in the basic document upon which the 1950 Act was based, the recommendations of the Bureau of the Budget with respect to the Organization and Operations of the Panama Canal and the Panama Railroad Company (R. 81 at 95, 102), and again in the hearings before the Senate (R. 109) and before the House of Representatives.[33] This emphasis on the essential nature of Presidential review and approval was made by representatives of the Bureau of the Budget, who had prepared the basis for the statutory plan and who explained the bill to the Committee. It is entitled to great weight.

The fact that this point was not stressed during the remainder of the legislative consideration is not astonishing. This feature of the 1950 Act—that the President had the ultimate authority over the tolls—did not constitute any change in the existing law. Hence, it required less explanation and debate than the new aspects of the Act, such as those which supplied the President with a body of trained advisors who would assist him in the determination of the tolls, and those which lessened the financial burden of the Panama Canal.

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[33] Main Brief, p. 67, fn. 86.

2. The functions of the President under the statute do not involve an unconstitutional delegation of power

Respondents claim that Section 411 would be unconstitutional for failure to supply an "intelligible principle", if the President, in approving the tolls proposed by petitioner, could take into consideration matters other than those specified in the toll formula. As far as domestic matters are concerned, the legislative history indicates that the President should be guided by the principles of National Transportation Policy set forth in detail in Section 1 of the Transportation Act of 1940 (54 Stat. 889, 49 U. S. C., Ch. 1, note). This plainly supplies an intelligible principle. In the field of foreign relations, *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 315–322, 327, teaches that the principles of *Panama Refining Co* v. *Ryan*, 293 U. S. 388 and *Schechter Corp.* v. *United States*, 295 U. S. 495, are inapplicable.[34] Moreover, the standards for the administrative setting of charges for the use of Government-owned properties and facilities are less demanding than where the delegation is in the field of regulation.

The argument that Congress could not be presumed to permit the President to disregard the law equates

[34] The unconstitutionality of that part of Section 411 which requires presidential approval would be of little help to respondents. Since the approval requirement constitutes an essential part of the statutory plan (Main Brief, pp. 66–67), its unconstitutionality would invalidate the remainder of Sections 411 and 412, *i. e.*, the very basis of respondents' claim for relief.

the specific factors mentioned in the toll formula with the law, and thus begs the question. Under Section 411, petitioner is authorized to *prescribe* the tolls. Section 412 provides the formula pursuant to which petitioner is to *prescribe* tolls. The formula thus is designed to guide petitioner's proposals; it does not limit the President's approval power. The President may base the tolls actually approved by him upon considerations other than cold figures or accounting principles. In doing this, he does not violate the "law" because the toll formula, according to its own language, is intended to set a standard for the President's rate-making advisor, not to restrict the authority of the President himself.[35]

C. THE DUTY TO PRESCRIBE TO NEW TOLLS IS NOT OF A MINISTERIAL NATURE

Throughout their brief, respondents assume that petitioner's duty to prescribe *new* tolls is of a ministerial nature, and hence enforceable by mandamus. But if there be a ministerial duty at all, it is petitioner's obligation to consider whether or not new tolls are appropriate. If petitioner peremptorily refused even to examine that question, mandamus proceedings might perhaps be instituted by a person having standing to sue in a court which has jurisdiction to grant mandatory relief. *Virginia Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515, 551; *Interstate Commerce Commission* v. *Humboldt S. S. Co.,* 224 U. S. 474, 485. Petitioner, however, does not refuse to consider the problem. It currently is observing and examining

[35] Cf. Main Brief, p. 66.

whether or not a change in the toll rates is indicated or necessary, and it has decided that up to now no such action has been necessary.[36]

Respondents' argument that this negative decision constitutes mere "thinking about tolls" (Respondents' Brief, pp. 136, 138) brings to the fore a significant feature of the statutory plan. The very circumstances that petitioner needs to formalize only its positive decision to *change* the tolls and that there are no formal proceedings prior to that decision highlight the fact that petitioner's activities connected with the proposing of new tolls do not constitute conventional agency action subject to judicial review, but rather constitute an internal advisory activity within the Government, subject to disciplinary, but not judicial, review or compulsion.

In any event, the decision to change or not to change the tolls is discretionary. We have shown the many issues involved, requiring the determination of facts and the exercise of business judgment (Main Brief, pp. 81–84). Respondents' discussion of the factual background has accentuated the uncertainties and doubts in that area. Finally, we have shown that, apart from these discretionary elements, petitioner's decision hinged ultimately on the legal question of whether an operating deficit in the supporting business facilities, which even the Comptroller General has conceded to be a legitimate operating expense, constitutes an element of maintaining and operating the Panama Canal, together with the facilities and ap-

[36] Cf. Main Brief, pp. 17–18, 78–79, see also *New York Times*, January 30, 1956, p. 52, column 1.

purtenances thereto, within the meaning of the toll formula.

We believe we have shown that this question must be answered in the affirmative (Main Brief, pp. 84–89; see also *supra,* pp. 15–20), especially in view of the fact that the deficit has been caused by the allocation to the supporting activities of a portion of the cost of the Canal Zone Government, which according to Section 246 (e) constitutes an integral part of the cost of operating the Panama Canal enterprise as a whole. But in no event can it be said that petitioner's interpretation of the statute is arbitrary or capricious, or clearly erroneous. We repeat that, in these circumstances, the courts will not re amine this question of law (cf. Main Brief, pp. 73–74, 88–89).

Respondents' admit frankly at p. 137 of their brief that what they seek to compel is not agency action but what they consider to be "correct" agency action. This Court, however, has stated firmly that, while it may compel an agency to act where it arbitrarily refuses to act at all, it will not seek to control or guide the exercise of the agency's authority (Main Brief, p. 78). In particular, this Court will not, where an agency has acted, compel it to repeat its action and to reverse its earlier decision (Main Brief, p. 79). This is exactly what respondents have asked the judiciary to do in this case.

D. RESPONDENTS LACK STANDING TO SUE

We have shown in our Main Brief (pp. 100–131) that there are two reasons why respondents lack standing to challenge the alleged violation by peti-

tioner of its official duties. First, because respondents cannot show an interference with any legal right specifically belonging to them, since their interests do not differ from those of the general public in the proper administration of the law; and, second, because respondents are not adversely affected or aggrieved within the meaning of any relevant statute (*i. e.*, because the Canal Zone Code does not authorize such a suit by a person who has merely suffered a financial loss).

Respondents seek to overcome these obstacles by asserting that the United States entered into the Hay-Pauncefote Treaty and passed the 1950 Act in order to convey specific benefits and rights upon the shipping industry (Respondents' Brief, pp. 152-153), not for the benefit of "civilization" [37] or the public as a whole.[38] This attitude is in full accord with respondents' suggestion that the deficit in petitioner's operations which would be caused by toll reductions would not require Congressional appropriations but could be met by reducing the interest payments to the United States (*supra,* p. 20). But this assertion that the 1950 statute was designed to confer rights upon respondents cannot prevail over the generally recognized rule that a regulatory statute does not constitute class legislation for the benefit of the users, but is designed to benefit the body politic as a whole; for that reason, a user may challenge the administration of such statute only where he is ex-

[37] Respondents' Brief, pp. 12, 153.

[38] Cf. our Main Brief, pp. 123-125.

pressly authorized to do so as a private Attorney General.[39]

E. THE DISTRICT COURTS OUTSIDE THE DISTRICT OF COLUMBIA DO NOT HAVE JURISDICTION TO AWARD MANDATORY RELIEF

On pp. 160–169 of their brief, respondents discuss the power of the federal courts to issue order of a mandatory nature and conclude (at p. 169) that the petitioner "relies largely on ancient cases obviously overruled by *In re Lennon, Virginian Ry., Peoria Ry., Brown* and other decisions of this Court". None of those cases has any bearing on the issue at hand, *viz,* whether the federal courts outside the District of Columbia have jurisdiction to award original mandatory relief in the absence of statutory authorization. The "segregation" or "integration" cases, as is well known to the Court, did not involve applications for original mandatory relief but injunctions against discrimination on account of color or race; in the remaining decisions, the mandatory relief was based upon specific provisions contained in the Interstate Commerce and Railway Labor Acts.

1. The "segregation" or "integration" cases

The gist of these cases has not been to compel official action—admission to schools—but to enjoin the de-

[39] *Reade* v. *Ewing*, 205 F. 2d 630 (C. A. 2); *United States* v. *Public Utilities Commission*, 151 F. 2d 609 (C. A. D. C.); *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470, 476–477; *American Power & Light Co.* v. *S. E. C.*, 325 U. S. 385; *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C. A. 2), cited in Respondents' Brief at pp. 148, 149, 155, all involve cases where persons financially affected had standing to sue because the statute expressly so provided; most of those cases state that, absent such specific authorization, the mere finan-

fendant officials from continuing unconstitutional interference with the plaintiff's constitutional rights. This is evident from the prayers in the complaint in *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294, which request—apart from declaratory relief:

> 4. The Honorable Court issue a permanent injunction forever restraining and enjoining the defendants from *executing* so much of Ch. 72–1724, General Statutes of Kansas, 1935, as empowers them to set up separate schools for Negro and white school children.
>
> 5. The Honorable Court issue a permanent injunction forever restraining defendants from *denying* the Negro school children of Topeka, Shawnee County, Kansas, *on account of their race or color,* the right and privilege of attending public schools within the district wherein they live. * * *[40]

Sweatt v. *Painter*, 339 U. S. 629, arose in the state courts; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, did not involve a question of admission, but the question of the discriminatory treatment afforded to a colored student once he had been admitted to the school. In *Lucy* v. *Adams*, 350 U. S. 1, the decree did not direct admission but enjoined the defendants from

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cial loss would not have been sufficient to confer standing on the plaintiffs. See our Main Brief at pp. 106–107, 124–125.

[40] Transcript of Record in No. 1, October Term, 1954, p. 7. Emphasis added. For similar complaints, see October Term, 1954, No. 2, pp. 10–11; No. 3, pp. 25–30; No. 5, pp. A20–A21. Significantly, the complaint in No. 4 (*Bolling* v. *Sharpe*), arising in the District of Columbia, contains a prayer for active mandatory relief requiring admission to a specific school in addition to a request to enjoin discrimination on the grounds of color and race (Transcript of Record, pp. 11–13).

denying the plaintiffs admission "solely on account of their race and color".

These "segregation" cases decided by this Court thus do not stand for the proposition that the federal courts outside the District of Columbia [41] have power to compel effective official action. Brevity does not permit us to analyze all the decisions of the lower federal courts cited by respondents on p. 166 of their brief. In *Bryce* v. *Byrd*, 201 F. 2d 664 (C. A. 5), the defendant was not ordered to register, as respondents assert, but to cease discriminatory practices. Similarly, in *School Board of the City of Charlottesville* v. *Allen*, 240 F. 2d 59, 64 (C. A. 4), the defendants were not "ordered to admit" but to refrain from discriminating on account of race, leaving all other grounds of denial unaffected.[42] These cases thus do not indicate a departure from the rule of *McIntire* v. *Wood*, 7 Cranch 503 (Main Brief, pp. 90 *ff*).

2. Respondents' remaining cases are all based upon specific statutory authority for mandatory relief

(*a*). *The Interstate Commerce Act.* Respondents place great stress on the mandatory relief awarded in *In re Lennon*, 166 U. S. 548, and a statement in *Peoria Ry. Co.* v. *United States*, 263 U. S. 528, indicating, by way of explanation, that switching orders are enforce-

[41] Cf. *Bolling* v. *Sharpe*, *supra*, fn. 40, and *Sweatt* v. *Painter*, 339 U. S. 629.

[42] In *Clemons* v. *Board of Education*, 228 F. 2d 853 (C. A. 6), a three-way-split Court of Appeals seems to have awarded relief of a mandatory nature, by way of compromise. The Court of Appeals for the Sixth Circuit, however, is fully aware of the limitation of the powers of the federal courts to grant mandatory relief. *Youngblood* v. *United States*, 141 F. 2d 912, 913.

able by mandatory injunction, including preliminary restraining orders. The fact, however, is that in those instances the power to grant mandatory relief rested upon the specific provision of Section 10 of the Act of March 2, 1889, amending the original Interstate Commerce Act (25 Stat. 862, 49 U. S. C. 23).[43] That Section expressly authorizes all the federal district courts to award mandatory relief against discriminatory practices or the denial of equal facilities. This Court has pointed out that this amendment was necessary in order to make "the remedial processes of the [original Interstate Commerce] act more speedy and efficacious".[44]

The complaint in *In re Lennon*, 166 U. S. 548, alleged a denial of equal facilities in violation of the Interstate Commerce Act, as amended.[45] The power

[43] Section 10 of the 1889 Amendment frequently has been referred to as Section 23 of the Interstate Commerce Act. This designation has been made official by the Act of May 16, 1942, Section 5, 56 Stat. 301.

[44] *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 499. And see *Knapp* v. *Lake Shore Ry. Co.*, 197 U. S. 536, 542–543, ruling that the duties imposed by the Interstate Commerce Act are enforceable in mandatory proceedings only where the statute so provides (our Main Brief, p. 94). For holdings that mandatory relief against discriminatory practices would not be available but for the 1889 amendment, see also *Macon, D. & S. R. Co.* v. *General Reduction Co.*, 44 F. 2d 499, 501 (C. A. 5), certiorari denied, 283 U. S. 821; *United States ex rel. Greenbrier Coal & Coke Co.* v. *Norfolk & Western Co.*, 143 Fed. 266, 267 (C. A. 4), 138 Fed. 849, 851–852 (C. C. S. D. W. Va.); *Merchants' Coal Co.* v. *Fairmont Coal Co.*, 160 Fed. 769, 779–780 (C. A. 4), appeal dismissed, 215 U. S. 614.

[45] Transcript of Record, No. 254, October Term, 1894, p. 5; see also *Toledo, Ann Arbor and N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 746, 747 (C. C. N. D. Ohio), affirmed, *sub nom. Ex parte Lennon*, 64 Fed. 320 (C. A. 6), 166 U. S. 548.

to award mandatory relief thus flows directly from Section 10 of the 1889 amendment. The same is true for the statement in *Peoria Ry. Co.* v. *United States*, 263 U. S. 528, explaining that switching duties are enforceable by mandatory relief.[46] Of the six authorities cited by this Court for this proposition (263 U. S. at 535, fn. 8), four involve discriminatory practices, *viz.*, *Toledo, Ann Arbor and N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730 (C. C. N. D. Ohio);[47] *Toledo, Ann Arbor and N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 746 (C. C. N. D. Ohio);[48] *Chicago, Burlington & Quincy Ry. Co.* v. *Burlington, Cedar Rapids & Northern Ry. Co.*, 34 Fed. 481 (C. C. S. D. Iowa);[49] *Covington Stock-yards Co.* v. *Keith*, 139 U. S. 128, alleged unjust and illegal discrimination (139 U. S. at 129). The grant of mandatory relief in *Union Pacific R. R. Co.* v. *Hall*, 91 U. S. 343, rests, as appears from the very first sentence of that opinion, upon specific legislation, the Act of March 3, 1873 (R. S. 5262, 45 U. S. C. 88);[50] the last case, *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa*, 233 U. S. 334, arose in the state

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[46] This statement in the *Peoria Ry.* case is by no means a holding. It merely served as an explanation for the reason why Congress had failed to grant certain summary powers to the Interstate Commerce Commission.

[47] This case is based on the same complaint as *Toledo, Ann Arbor and N. M. Ry Co.* v. *Pennsylvania Co.*, 54 Fed. 746 (C. C. N. D. Ohio), *i. e.*, *In re Lennon*, 166 U. S. 548, *supra*, fn. 45.

[48] This case is the district court decision in *In re Lennon*. For the allegation of discriminatory practices, see *supra*, fn. 45.

[49] The allegation of a denial of equal facilities appears at 34 Fed. at 483–484.

[50] See our Main Brief, p. 93, fn. 10.

courts of Iowa; hence, it did not present the question of whether the *federal* courts have mandamus powers.

In *Lucking* v. *Detroit Navigation Co.*, 265 U. S. 346, and *Moor* v. *Texas & N. O. R. Co.*, 297 U. S. 101 (cited in Respondents' Brief at pp. 163–165), the courts denied relief. The latter case clearly came under Section 10 of the 1889 amendment to the Interstate Commerce Act; the former involved a question of coverage under that Act. The courts held that the abandonment of a steamship line did not come within the Interstate Commerce Act and thus did not reach the issue whether mandatory relief was available under the provisions of that Act.

(*b*). *The Railway Labor Act. Virginian Ry.* v. *System Federation No. 40,* 300 U. S. 515, is based on the provisions of the Railway Labor Act of 1934, as we have shown in our Main Brief (pp. 96–97). The same applies to *Delaware & Hudson R. Corp.* v. *Williams,* 129 F. 2d 11 (C. A. 7), certiorari granted and judgments vacated, 317 U. S. 600,[51] and *Steele* v. *Louisville and Nashville R. R. Co.,* 323 U. S. 192, upon which respondents rely in other parts of their brief.

(*c*). *The Prohibition Act.* The Prohibition cases cited by respondents do not support their claim that the federal district courts have general power to issue mandatory orders. The authority of the courts to direct the liquor law officials to grant licenses or to cancel revocations was based on the express statutory authority contained in Title II, Sections 5, 6, and 9

[51] At 129 F. 2d 15, the Court of Appeals discussed the many provisions of the Railway Labor Act expressly providing mandatory relief.

of the National Prohibition Act, 41 Stat. 309–312, 27 U. S. C. (1925 Ed.) 14, 16, 21. Those sections provided that the denial or revocation of licenses could be reviewed by appropriate proceedings in or before a court of equity. These review provisions conferred upon the courts, by necessary implication, the power to direct the grant or restoration of a license improperly withheld or revoked.[52]

We conclude that the authorities collected by respondents merely confirm our position that mandatory relief is not available in the federal courts outside the District of Columbia unless authorized by statute; and that it cannot be implied from the mere grant of a right or the imposition of a duty.

F. THE COURT OF APPEALS IMPROPERLY DIRECTED THE ENTRY OF SUMMARY JUDGMENT

Respondents try to create the impression that the entry by the Court of Appeals of summary judgment in their favor was the just reward for petitioner's alleged attempt to confuse the proceedings by moving to dismiss for lack of jurisdiction after respondents had moved for summary judgment. Actually, respondents are the ones guilty of disregard for orderly procedure by moving for summary judgment before petitioner's time to file a responsive pleading had expired—and before they themselves even had sufficient evidence, as is shown by the extensive recovery proceedings initiated by them (Main Brief, pp. 131–132).

[52] We have not had an opportunity to analyze the cases cited in the Student Note in the 1938 volume of *Columbia Law Review* (Respondents' Brief, p. 164). Many of them seem to be Prohibition cases.

Their argument that the District Court granted summary judgment to petitioner is based on what respondents urged the District Judge to do, not on what he did. As we have shown in our Main Brief (pp. 24, 132–133), the District Judge twice extended the time to answer the motion for summary judgment—first, until argument of the motion to dismiss (R. 207–208), and subsequently until disposition of that motion (R. 212–213). He expressly stated that he would limit his decision to the jurisdictional issues (R. 202, 205), and stressed that it would be impossible to pass on the motion for summary judgment before petitioner had answered it in full.[53] Respondents' own argument (at p. 171 of their brief) shows that their motion papers for summary judgment were before the District Court not as a motion but as answering papers to petitioner's motion to dismiss.[54] Nor did the District Court's disposition of the motion indicate that it disposed of the merits of the case. True, the judge discussed some of the basic facts, and to that extent he assumed jurisdiction to determine his juris-

[53] The court's remark, "I do not see how he can be prepared to grant you relief until he knows they have exhausted their proof" (R. 206), indicates that he did not consider the 10-page Colby affidavit in support of the motion to dismiss as a full answer to respondents' motion for summary judgment. *Central Mexico Light & Power Co.* v. *Munch*, 116 F. 2d 85 (C. A. 2) (cf. Respondents' Brief, p. 172), holds expressly that a motion to dismiss for lack of jurisdiction may be made upon affidavits and that the making of such a speaking motion does not preclude a dismissal upon jurisdictional grounds.

[54] As such, they constituted, of course, a part of the record on appeal.

diction. It is elementary, however, that this does not constitute an adjudication on the merits.[55]

In any event, the case was not ripe for an adjudication on the merits. Respondents' own Statement of Facts and Part One of its argument in this Court establish that, even in respondents' view, petitioner's duty to lower its rates rests on a host of highly controversial factual issues [56]—not to mention the circumstance that respondents now rely heavily on petitioner's supposed failure to charge "just and equitable" tolls, an allegation which is not even contained in their complaint.

G. THE COURTS LACK JURISDICTION OVER RESPONDENTS' CLAIM FOR PAST OVERCHARGES

If we are right that the courts do not have jurisdiction to grant prospective relief with respect to the Canal tolls, it necessarily follows that respondents cannot, by indirection, obtain the same result in the guise of a refund of tolls collected in the past. But even if we are wrong in our argument as to prospective relief, there are several reasons why respondents still cannot recover for past tolls.[57] In the first place,

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[55] A ruling on respondents' standing to sue goes to a jurisdictional issue in the normal usage of that term. *Osborn* v. *The Bank of the United States*, 9 Wheat. 738, 819; *Fairchild* v. *Hughes*, 258 U. S. 126, 129; *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 150 (concurring opinion); *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 197.

[56] In an effort to prove these "facts", respondents append to their brief in this Court an appendix of fifty pages, most of which is not included in the record.

[57] If respondents actually were entitled to prospective relief, the proper way to attack the tolls would have been by mandamus or injunction, if necessary by obtaining interlocutory

the argument that the courts have jurisdiction over their claim for a refund of excessive tolls paid in the past falls with their assumption that the President's role in the statutory plan is negligible and limited to that of a clerical supervisor of the petitioner's cost computations. We have shown that this is not the case. The President is to act as President and to determine the tolls not merely on the basis of arid computations and their effect on the shipping industry, but to take into account that the United States operates the Canal under a "mandate from civilization" [58] as a whole. This interpretation of Sections 411 and 412 does not mean that the President may "disobey" the toll formula, but that the statute directs him to take into account, in addition, factors outside those enumerated in Section 412 (*supra*, pp. 27–28). The President thus is the true promulgator of the toll rates, and petitioner a technical advisor. If the

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orders. Respondents cannot pay the tolls and thereafter ask for a refund. *Commissioner of Internal Revenue* v. *National Lead Company*, 230 F. 2d 161, 165 (C. A. 2), affirmed on other grounds, 352 U. S. 313.

In any event, since the complaint does not allege that any tolls have been paid under protest, it may well be that the doctrine of the non-recoverability of voluntary payments to the Federal Government precludes their recovery. *E. g.*, *United States* v. *Edmondston*, 181 U. S. 500; *Chesebrough* v. *United States*, 192 U. S. 253; see also *Callanan Road Improvement Co.* v. *United States*, 345 U. S. 507.

[58] Respondents' Brief, p. 12.

statute is thus construed, it is obvious that the President is an indispensable party to a suit for a refund.[59]

Respondents' damage claim must also fail for lack of a duty owed *to them* by petitioner. Respondents claim that Congress created "between shipowners and defendant [petitioner] legal relationships".[60] We have pointed out in our Main Brief and above that duties in this area are owed to "superior executive and legislative authority"[61] or to the public as a whole, not to the users individually or as a class.[62]

Respondents, finally, take the position that, in spite of the express statutory command that any toll changes are to be prospective,[63] retroactive refunds must be awarded because of the delays in the rate-fixing procedure, and because otherwise respondents would be deprived of the benefit of the toll formula during the period consumed by the rate determination. There is nothing unusual to respondents' position. Many regulatory statutes provide that a utility may charge only—and is entitled to—a reasonable rate, and that a rate which is not just or reasonable is unlawful.[64] Still, these statutes, like Section 411, commonly provide only

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[59] Considering the true role and responsibility of the President in the statutory scheme, there is little merit to the argument that petitioner has prevented the President from acting by failing to submit new tolls for his approval. The President, of course, has ample powers to compel action by petitioner.

[60] Respondents' Brief, p. 184.

[61] *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 129.

[62] *Supra* and Main Brief, pp. 123–127.

[63] Main Brief, p. 140.

[64] See, *e. g.*, Federal Power Act, Section 205 (a), 49 Stat. 851, 16 U. S. C. 824d; Natural Gas Act, Section 4, 52 Stat. 822, 15 U. S. C. 717c.

for a prospective rate determination,[65] although it is well known that rate proceedings are protracted. The failure to make a rate increase retroactive, thereby depriving the utility of a compensatory rate during the period during the new rate was suspended, does not violate the constitutional guarantees against confiscation. *Hope Natural Gas Co.* v. *Federal Power Commission,* 196 F. 2d 803 (C. A. 4). It is recognized that such lag is inevitable and may benefit the user or the utility, depending on whether the rates are being increased or decreased. Respondents benefited from a similar suspension from 1948 until 1951,[66] and during this period the Canal did not benefit from the financial relief afforded to it as of July 1, 1951,[67] by the 1950 Act (*supra,* p. 5). Lastly, if the prospective operation of a rate change does not violate the Constitution, it cannot be held to conflict with any obligation under the provisions of the Hay-Pauncefote Treaty.

Respectfully submitted.

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Attorneys.

APRIL 1958.

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[65] See, *e. g.*, Federal Power Act, Section 206 (a), 49 Stat. 852, 16 U. S. C. 824e; Natural Gas Act, Section 5, 52 Stat. 823, 15 U. S. C. 717d.

[66] Main Brief, pp. 13–14.

[67] Act of September 26, 1950, Section 14, Main Brief, p. 169.

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APPENDIX A

THE WHITE HOUSE,
Washington, August 13, 1915.

Hon. LINDLEY M. GARRISON,
Secretary of War.

MY DEAR MR. SECRETARY: With reference to your letter of July 29th, I am sending you herewith the Attorney General's opinion on the subject of Panama Canal tolls. After a copy of this opinion has been made for your files, will you not be good enough to return the original to me?

Sincerely yours,

(Sgd) J. P. TUMULTY,
Secretary to the President.

Enclosure.

DEPARTMENT OF JUSTICE,
Washington, June 3, 1915.

SYNOPSIS OF ATTACHED MEMORANDUM RELATING TO THE QUESTION OF LIABILITY OF UNITED STATES VESSELS TO PAYMENT OF PANAMA CANAL TOLLS

The questions presented are:

1. Are vessels operated by the United States required to pay tolls, under (A) the Panama Canal Act, and (B) the Hay-Pauncefote Treaty, when passing through the Panama Canal.

11. In the event such vessels do not pay tolls, should their tonnage be considered in connection with the establishment of a new toll rate when such a change comes up for consideration.

It is understood from the letter of the Secretary of War, dated April 8, 1915, that the term "vessels oper-

ated by the United States" is intended to be confined to

> vessels operated by the United States, including warships, naval tenders, colliers, transports, hospital ships, and other vessesl owned or chartered by the United States used for transporting troops or supplies. It was not intended, however, to apply to vessels owned by the United States, but operated commercially in competition with other commercial vessels.

The references in this synopsis are to the memorandum on the same subject hereto attached.

I

RELATING TO PAYMENT OF TOLLS

(Memo. pp. 1 to 16)

The questions presented involve consideration of (A) The Panama Canal Act and (B) the Hay-Pauncefote Treaty.

A. Panama Canal Act

(Memo. pp. 1 and 2)

There is no implied or express provision of the Panama Canal Act of August 24, 1912 (37 Stat. 560), as amended by the Act of June 15, 1914, which requires the payment of tolls for vessels operated by the United States, so this phase of the question may be answered in the negative and dismissed without further consideration.

B. Hay-Pauncefote Treaty

(Memo. pp. 2 to 16)

The United States are, by virtue of the Hay-Varilla Treaty of 1903, the practical sovereign of the Panama

Canal Zone. This sovereignty is complete, except as limited by the Hay-Varilla and the Hay-Pauncefote Treaties. The rights of the United States, in so far as the present questions are concerned, are more restricted in every particular by the latter treaty, so that it alone need be considered.

Section 1 of Article III of the Hay-Pauncefote Treaty provides:

> The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable.

The application of this section to the proposal to exempt vessels operated by the United States from the payment of tolls, raises two questions:

1. Would such exemption be a discrimination against other nations or their subjects, and,
2. Would it violate the provisions guarantying just and equitable charges.

1

Discrimination

(Memo. pp. 4–15)

The provisions of the section must be read in the light of (*a*) conditions existing at the time the treaty was negotiated; (*b*) the interpretation given it by the parties; (*c*) the spirit of the treaty; and (*d*) estoppel of Great Britain to claim that the United States should pay tolls on their vessels.

a. Rebus sic stantibus
(Memo. pp. 4 to 8)

All treaties are concluded under the tacit condition *rebus sic stantibus*. At the time this treaty was made the United States had not acquired sovereignty over the Canal Zone. Only, therefore, such rights and obligations were considered by the parties as might, relatively to Great Britain, adhere in the United States, being such as were incident to the ownership and management of a canal to be constructed on foreign soil under rights to be acquired by treaty. Nothing in the treaty or the conditions existing at the time it was negotiated precludes, as far as the question of discrimination is concerned, the use of the Canal, without payment of tolls, by the United States for its vessels operated as governmental agencies.

b. Interpretation by the parties
(Memo. pp. 8 to 13)

The negotiations which resulted in the execution of the treaty and subsequent interpretations by the parties show that the treaty was not intended to limit the right of the United States, after acquiring virtual sovereignty of the Canal Zone, to fortify and protect the Canal and to use it as a national defense.

c. Spirit of the treaty
(Memo. p. 13)

The spirit of the treaty is controlling. The United States being the owner of both vessel and Canal, any payment of tolls would be from itself to itself. This would be a useless formality, the omission of which would not benefit the United States nor injuriously affect other nations. The failure to go through the form of taking money from one Government officer and handing it over to another would not, independently of the

question of equitableness of rates, constitute such a discrimination as is forbidden by the treaty. The spirit of the treaty does not require the performance of a useless formality.

d. Great Britain estopped
(Memo. pp. 13 to 15)

Great Britain was in January, 1913, specifically advised that the United States so interpreted the treaty as to "exempt from the payment of tolls its vessels of war and other vessels engaged in the service of this government." During the long time that has elapsed since this notice was given, Great Britain has failed to object to this interpretation of the treaty and is, therefore, now estopped to challenge its correctness.

Just and Equitable Charges
(Memo. p. 16)

Section 1 of Article III of the treaty provides that "conditions and charges of traffic shall be just and equitable."

It may be strongly urged that the argument relating to sovereignty over the Canal Zone, disposes of this phase of the question also, but, whether it does or not, this provision is not violated as long as the rates charged are limited to an amount representing the fair value of the services rendered. Great Britain claims that this should be limited to the "interest on the capital expended and the cost of the operation and maintenance of the canal." At present, upon this basis or any other fair basis of calculation, it costs the United States, according to the testimony of General Goethals, two or three times as much to transfer a vessel through the Canal as it receives for such services. The present rates, therefore, cannot be considered unjust or inequitable.

II.

RELATING TO CONSIDERATION OF TONNAGE IN ESTABLISHING TOLL RATES

(Memo. p. 17)

For the same reasons that the United States are not required to pay tolls on vessels operated as governmental agencies, they are not required to consider the tonnage of such vessels in connection with the establishment of toll rates.

CONCLUSION

It therefore appears that at present and perhaps for a long time in the future, the passage through the Canal of vessels of war or other vessels used as governmental agencies, as distinguished from those engaged in commercial traffic, without either payment of tolls or consideration of their tonnage in fixing rates, will not violate either the provisions of the Hay-Pauncefote Treaty or the Panama Canal Act.

DEPARTMENT OF JUSTICE,
Washington, June 3, 1915.

MEMORANDUM RELATING TO THE QUESTION OF LIABILITY OF UNITED STATES VESSELS TO PAYMENT OF PANAMA CANAL TOLLS

The questions presented are:

1. Are vessels operated by the United States required to pay tolls, under (A) the Panama Canal Act, and (B) the Hay-Pauncefote Treaty, when passing through the Panama Canal.

11. In the event such vessels do not pay tolls, should their tonnage be considered in connection with the establishment of a new toll rate when such a change comes up for consideration.

It is understood from the letter of the Secretary of War, dated April 8, 1915, that the term "vessels operated by the United States" is intended to be confined to

> vessels operated by the United States, including warships, naval tenders, colliers, transports, hospital ships, and other vessels owned or chartered by the United States used for transporting troops or supplies. It was not intended, however, to apply to vessels owned by the United States, but operated commercially in competition with other commercial vessels.

I

RELATING TO PAYMENT OF TOLLS

A. Under Panama Canal Act

There is no implied or express provision of the Panama Canal Act of August 24, 1912 (37 Stat. 560), as amended by the Act of June 15, 1914, which requires the payment of tolls for vessels operated by the United States, so this phase of the question may be answered in the negative and dismissed without further consideration.

B. Under the Hay-Pauncefote Treaty

The United States are, by virtue of the Hay-Bunau-Varilla Treaty of 1903, the practical sovereign of the Panama Canal Zone.

A sovereign has exclusive control of a canal built through its own territory at its own expense. It may exclude foreign vessels at discretion or admit them upon any conditions it may impose, unless restricted by treaty obligations. Examples of such canals are the Kiel and Corinth Canals.

The United States, therefore, have complete control

over the Panama Canal and may exercise same in any way desired, except where restricted by treaties.

The United States have made several treaties which affect their control of the Canal, but inasmuch as their rights, in so far as the present questions are concerned, are more restricted in every particular in the Hay-Pauncefote Treaty than any other, this discussion may be limited to a consideration of the latter treaty.

By this treaty the United States and Great Britain agreed that the Clayton-Bulwer Treaty should be superseded "without impairing the 'general principle' of neutralization established in Article VIII" thereof.

The "general principle" of neutralization referred to was not neutralization in its strict and technical sense, but only the principle of joint protection of the Canal by the two countries and equality of treatment between "the citizens and subjects of the United States and Great Britain" and "the citizens and subjects of every other State which is willing to grant thereto such protection as the United States and Great Britain engage to afford."

> If the wording of the Article (Article VIII) is examined, it will be seen that there is no mention of belligerent action in it at all. Joint protection and equal treatment are the only matters alluded to and it is to one, or both, of these that neutralization must refer. (Letter from Secretary of State for Foreign Affairs of Great Britain to Ambassador Bryce, November 14, 1912.)

The element of joint protection was expressly superseded, it being one of the purposes of the Hay-Pauncefote Treaty to vest in the United States the right of exclusive control and management and also the duty alone to protect the Canal.

So it results that the only element of the "general

principle of neutralization" referred to in the Clayton-Bulwer Treaty which was preserved in the Hay-Pauncefote Treaty was equality among citizens and subjects of all nations, which does not enter into the question here under consideration.

Our present investigation may be restricted, therefore, to a consideration only of the limitations placed upon the United States by the Hay-Pauncefote Treaty. These limitations, being in derogation of sovereign rights are, under the rules of international law, to be construed strictly.

> Whether they be customary or contractual in their origin, they must be construed strictly. If therefore a dispute occurs between a territorial power and a foreign power as to the extent or nature of rights enjoyed by the latter within the territory of the former, the presumption is against the foreign state, and upon it the burden lies of proving its claim beyond doubt or question. (Hall's International Law, 6th Ed., 1909, p. 159.)

Section 1 of Article III of the Hay-Pauncefote Treaty provides:

> The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable.

The application of this Section to the proposal to exempt vessels operated by the United States from the payment of tolls, raises two questions:

> 1. Would such exemption be a discrimination against other nations or their subjects, and
> 2. Would it violate the provisions guarantying just and equitable charges?

1

Discrimination

The provisions of the section must be read in the light of (*a*) conditions existing at the time the treaty was negotiated; (*b*) the interpretation given it by the parties; (*c*) the spirit of the treaty; and (*d*) estoppel of Great Britain to claim that the United States should pay tolls on their vessels.

a. Rebus Sic Stantibus

All treaties are concluded under the tacit condition *rebus sic stantibus*. At the time this treaty was made the United States had not acquired sovereignty over the Canal Zone. Only, therefore, such rights and obligations were considered by the parties as might, relatively to Great Britain, adhere in the United States, being such as were incident to the ownership and management of a canal to be constructed on foreign soil, under rights to be acquired by treaty.

This is manifest from the following excerpt from the letter of the Marquis of Lansdowne to Lord Pauncefote, dated February 22, 1901, with reference to the exclusion of a proposed amendment, similar to Article X of the Suez Canal Convention, which provided that the rules guarantying the inviolability of the Canal should not "apply to measures which the United States may find it necessary to take for securing by its own forces the defense of the United States and the maintenance of public order."

> It is, I understand, contended in support of the Senate Amendment that the existence of the above provisions in the Suez Canal Convention justifies the demand now made for the insertion of analogous provisions in regard to the proposed Nicaragua Canal.
>
> But the analogy which it has been attempted to set up fails in one essential particular. The

> banks of the Suez Canal are within the dominions of a territorial sovereign, who was a party to the Convention, and whose established interests it was necessary to protect, whereas the Nicaragua Canal will be constructed in territory belonging not to the United States, but to Central American states, of whose sovereign rights other powers cannot claim to dispose.

It is clear, therefore, that the United States, though not expecting to derive from the treaty with Great Britain the right to use the Canal as a national defense, nevertheless took the precaution not to foreclose, by the treaty with Great Britain, the right to so use the Canal provided they became the sovereign thereof or secured such right from the territorial sovereign. While the particular amendment above referred to was not adopted, the failure to incorporate its provisions in the treaty was not due, as we shall later see, to the surrender of the principle, but because it was conceded by Great Britain, in notes interpreting the treaty, that this right was already reserved to the United States by the treaty and that the amendment was therefore unnecessary.

It will not be presumed, therefore, that the United States, at a time they were not possessors of the territory through which the Canal would pass, intended to deprive themselves of the right to take such measures as might be necessary for securing the defense, not only of the Canal Zone, but also of the United States, should they become sovereign of such territory or secure from its sovereign treaty rights permitting such action. Indeed, the United States, as sovereign of the Canal Zone, could protect the Canal, if a belligerent, only by defending the Nation.

> The consent of a State to a treaty presupposes a conviction that such treaty is not fraught with danger to its existence and devel-

opment, and implies a condition that, if by an unforeseen change of circumstances the obligations stipulated in the treaty should imperil the said State's existence and necessary development, the treaty, although by its nature unnotifiable, should nevertheless be notifiable. (1 Oppenheim, International Law (1912), Sec. 539.)

Prior to the making of this treaty the United States, through her public men, had repeatedly proclaimed their purpose in undertaking the construction of an Isthmian Canal.

> Without urging further the grounds of my opinion, I repeat, in conclusion, that it is the right and duty of the United States to assert and maintain such supervision and authority over any interoceanic canal across the Isthmus that connects North and South America as will protect our national interests. (Excerpt from Message of President Hayes, March 8, 1880, p. 4991 of Vol. 33, part 6, Cong. Rec.)
>
> It is as regards the political control of such a canal as distinguished from its merely administrative or commercial regulation, that the President feels called upon to speak with directness and with emphasis. During any war to which the United States of America or the United States of Colombia might be a party, the passage of armed vessels of a hostile nation through the Canal of Panama would be no more admissible than would be the passage of the armed forces of a hostile nation over the railway lines joining the Atlantic and Pacific shores of the United States or of Colombia. And the United States of America will insist upon her right to take all needful precautions against the possibility of the Isthmus transit being in any event used offensively against her interests upon the land or upon the sea. (Excerpt from letter, dated June 24, 1881, addressed by Secretary of State Baline to Mr.

Lowell, United States Minister at London, Vol. 33, part 6, p. 4991, Cong. Rec.)

In a memorandum prepared by the Secretary of State and sent to the Senate, while the confirmation of the treaty was under consideration, Mr. Hay said:

> No longer insisting upon the language of the Davis amendment—which had in terms reserved to the United States express permission to disregard the rules of neutrality prescribed, when necessary to secure its own defense, which the Senate had apparently deemed necessary because of the provision in Rule 1, that the canal should be free and open "in time of war as in time of peace" to the vessels of all nations, it was considered that the omission of the words "in time of war as in time of peace" would dispense with the necessity of the amendment referred to, and that war between the contracting parties, or between the United States and any other power would have the ordinary effect of war upon treaties when not specially otherwise provided, and would remit both parties to their original natural right of self-defense and give to the United States the clear right to close the canal against the other belligerent, and to protect it and defend itself by whatever means might be necessary. (Senate Doc. No. 746, 61st Cong. 3d Sess.)

By such statements, and many others like them, Great Britain, at the time the treaty was executed, was put upon notice that the United States were seeking such control over the Canal as would make it available as one of the national defenses of the country, and, therefore, the treaty should be interpreted as vesting such right in the United States, in the event they obtained from the sovereign of the soil the right to so use the Canal.

> If two meanings of a stipulation are admissible according to the text of a treaty, such

> meaning is to prevail as the party proposing the stipulation knew at the time to be the meaning preferred by the party accepting it. (1 Oppenheim, International Law (1912), Sec. 554 (8).)
>
> If, therefore, the meaning of a stipulation is ambiguous, such meaning is to be preferred as is less onerous for the obliged party, or as interferes less with the parties' territorial and personal supremacy, or as contains less general restrictions upon the parties. (1 Oppenheim, International Law (1912), Sec. 554 (4).)
>
> It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances. (Field, *J.* in *In re Ross* (1896), 140 U. S. 453, 475.)
>
> (See also *Ware* v. *Hylton*, 3 Dall. 199, 249; and *United States* v. *Texas*, 162 U. S. 1, 27.)

b. Interpretation by the parties

The rights which the United States were to have under the treaty as owner and constructor of the Canal are set out in Article II as follows:

> subject to the provisions of the present treaty, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

This Article presupposes, in addition to the right to provide for the regulation and management of the Canal, other rights in the United States which were not prohibited by the provisions of the treaty.

These other rights, thus reserved to the United States, include all of those, not expressly prohibited, which might appertain to the United States under the conditions then existing or which might accrue by virtue of transfer to them of the sovereignty of the State

owning the territory through which the Canal might pass. When, therefore, the United States, already the sole protector of the Canal, became also the sovereign of the Canal Zone, the treaty was henceforth to be considered in the light of such changed conditions and not to deprive the United States of the exercise, on such territory, of the sovereign right, acquired with the ownership of the Zone, to use same in self-defense.

This has been conceded by Great Britain, as above stated, in the interpretation put upon the treaty in notes exchanged while the parties were negotiating same and also during the exchange of notes relative to the act exempting coastwise vessels from payment of tolls.

In the first draft of the treaty, as ratified by the United States Senate, there was a provision that certain stipulations guarantying the inviolability of the Canal shall not "apply to measures which the United States may find it necessary to take for securing by its own forces the defense of the United States and the maintenance of public order." Section 1 of Article III of this draft of the treaty provided:

> The canal shall be free and open, in time of war as in time of peace, to the vessels of commerce and of war of all nations, on terms of entire equality.

The negotiations between the two Governments which resulted in striking the words "in time of war as in time of peace," from Section 1 of Article III, as well as the provision which exempted the United States from the observance of the stipulations of sections one to five inclusive of Article III, show that it was understood that the removal of both of these provisions, together with another provision, forbidding the United States to fortify the Canal, gave the United

States the right to fortify same and to use and control it, if a belligerent, in any way it might deem necessary for the defense of the Canal and the Nation, while at the same time allowing to neutral powers the passage of their vessels, if it did not interfere with the defensive measures adopted.

This is shown by the following excerpts from the notes exchanged during such negotiations.

> 7. The various points connected with the defense of the canal may conveniently be considered together. In the present draft the Senate Amendment has been dropped, which left the United States at liberty to apply such measures as might be found "necessary to take for securing by its own forces the defense of the United States." On the other hand, the words "in time of war as in time of peace" are omitted from rule 1, and there is no stipulation, as originally in rule 7, prohibiting the erection of fortifications commanding the canal or the waters adjacent.
>
> I do not fail to observe the important difference between the question as now presented to us and the position which was created by the amendment adopted in the Senate:
>
> In my despatch I pointed out the dangerous ambiguity of an instrument of which one clause permitted the adoption of defensive measures, while another prohibited the erection of fortifications. It is most important that no doubt should exist as to the intention of the contracting parties. As to this, I understand that by the omission of all reference to the matter of defense the United States Government desire to reserve the power of taking measures to protect the canal, at any time when the United States may be at war, from destruction or damage at the hands of an enemy or enemies. On the other hand, I conclude that, with the above exception, there is no intention to derogate from

the principles of neutrality laid down by the rules. As to the first of these propositions I am not prepared to deny that contingencies may arise when, not only from a national point of view, but on behalf of the commercial interests of the whole world, it might be of supreme importance to the United States that they should be free to adopt measures for the defense of the canal at a moment when they were themselves engaged in hostilities.

It is also borne in mind that, owing to the omission of the words under which this country became jointly bound to defend the neutrality of the canal, and the abrogation of the Clayton-Bulwer treaty, the obligations of Great Britain would be materially diminished.

This is a most important consideration. In my despatch of the 22d February I dwelt upon the strong objection entertained by His Majesty's Government to any agreement under which, while the United States would have a treaty right to interfere with the canal in time of war, or apprehended war, Great Britain alone, in spite of her vast possessions on the American continent and the extent of her interests in the East, would be absolutely precluded from resorting to any such action, or from taking measures to secure her interests in and near the canal. The same exception could not be taken to an arrangement under which, supposing that the United States, as the power owning the canal and responsible for the maintenance of its neutrality, should find it necessary to interfere temporarily with its free use by the shipping of another power, that power would thereupon at once and *ipso facto* become liberated from the necessity of observing the rules laid down in the new treaty. (Memorandum of the Marquis of Lansdowne, dated August 3, 1901, and enclosed with letter of August 3, 1901, addressed to Mr. Lowther by the Marquis of Lansdowne.)

I notice that in the course of the debate in the Senate on the Panama Canal Bill the argument was used by one of the speakers that the third, fourth, and fifth rules embodied in article 3 of the treaty show that the words "all nations" cannot include the United States, because, if the United States were at war, it is impossible to believe that it could be intended to be debarred by the treaty from using its own territory for revictualling its war-ships or landing troops.

The same point may strike others who read nothing but the text of the Hay-Pauncefote Treaty itself, and I think it is therefore worth while that I should briefly show that this argument is not well founded.

The Hay-Pauncefote Treaty of 1901 aimed at carrying out the principle of the neutralization of the Panama Canal by subjecting it to the same regime as the Suez Canal. Rules 3, 4, and 5 of article 3 of the treaty are taken almost textually from articles 4, 5, and 6 of the Suez Canal Convention of 1888. At the date of the signature of the Hay-Pauncefote Treaty the territory, on which the Isthmian Canal was to be constructed, did not belong to the United States, consequently there was no need to insert in the draft treaty provisions corresponding to those in articles 10 and 13 of the Suez Canal Convention, which preserve the sovereign rights of Turkey and of Egypt, and stipulate that articles 4 and 5 shall not affect the right of Turkey, as the local sovereign, and of Egypt, within the measure of her autonomy, to take such measures as may be necessary for securing the defense of Egypt and the maintenance of public order, and, in the case of Turkey, the defense of her possessions on the Red Sea.

Now that the United States has become the practical sovereign of the Canal, His Majesty's Government do not question its title to exercise belligerent rights for its protection. (Letter of Secretary of State for Foreign Affairs of Great

> Britain to Ambassador Bryce, dated November 14, 1912; handed to Secretary of State by British Ambassador December 9, 1912.)

One other Article alone of the Hay-Pauncefote Treaty need be considered, that is Article IV, which reads as follows:

> It is agreed that no change of territorial sovereignty or of international relations of the country or countries traversed by the beforementioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.

This Article does not mean that change of sovereignty shall destroy sovereign rights not in the contemplation of the parties at the time the treaty was made, but only that such change, whether to the United States or to a third party, would not affect the obligations assumed by the United States. It had no reference to the sovereign right of self-protection, and that right, as appurtenant to the soil, continued to exist, though sovereignty was transferred to the United States. Furthermore, the only "general principle of neutralization," preserved in the Hay-Pauncefote Treaty, as we have seen, was equality among citizens and subjects of all nations, which has no application to the question now under consideration, and therefore the above conclusions are not affected by this Article of the treaty.

This right freely to use the Canal at all times for the passage of their war vessels and to deny same to a belligerent enemy, therefore, is absolute in the United States, and it appears, independently of the question of tolls, that such use will not constitute a discrimination against other nations as that word is used in Section 1 of Article III.

c. Spirit of the treaty

We pass then to the question whether such use with exemption from tolls would constitute such discrimination.

Assuming that just and equitable toll rates have been prescribed, even if the strict letter of the treaty required payment of tolls for vessels operated by the United States as purely governmental agencies, the spirit of the treaty would not make such payment necessary, because it would be an ineffective and useless thing, benefiting no one, to require the owners of the Canal to pay themselves. The Government would merely be taking money from one hand and putting it into the other, a formality which no nation would insist upon.

The case of the Government paying tolls to itself for the passage of its own vessels is very different from requiring payment of tolls by private owners of vessels engaged in the coastwise trade, since in such case the party paying is different from the one receiving.

d. Great Britain estopped

Furthermore, it would seem that Great Britain is estopped to claim that the United States should pay toll on their vessels.

The United States interpretation of the treaty exempting its vessels of war and other vessels engaged in the service of the Government has been formally presented to the British Government in the following words:

> It is not believed, however, that in the objection now under consideration Great Britain intends to question the right of the United States to exempt from the payment of tolls its vessels of war and other vessels engaged in the service of this Government. Great Britain does not

> challenge the right of the United States to protect the canal. United States vessels of war and those employed in government service are a part of our protective system. By the Hay-Pauncefote Treaty we assume the sole responsibility for its neutralization. It is inconceivable that this Government should be required to pay canal tolls for the vessels used for protecting the canal, which we alone must protect. The movement of United States vessels in executing governmental policies of protection are not susceptible of explanation or differentiation. The United States could not be called upon to explain what relation the movement of a particular vessel through the canal has to its protection. The 'British' objection, therefore, is understood as having no relation to the use of the canal by vessels in the service of the United States Government. (Excerpt from letter dated January 17, 1913, from Secretary of State Knox to Irwin B. Laughlin, American Charge d' Affaires.)

This letter was answered by a note from Ambassador Bryce to the Secretary of State, dated February 27, 1913, but no reference was made to the position taken in the above excerpt, nor has any subsequent answer thereto been made. In this note, Ambassador Bryce said:

> and better also that when vessels begin to pass through the great waterway in whose construction all the world has been interested there should be left subsisting no cause of difference which could prevent any other nation from joining without reserve in the satisfaction the people of the United States will feel at the completion of a work of such grandeur and utility.

It is true, however, that Ambassador Bryce, in this note, said that "His Majesty's Government are unable before the Administration leaves office to reply fully

to the arguments contained in your despatch of the 17th ultimo to the United States Charge d' Affaires at London," but this reservation is probably nullified by failure, during the long intervening time, to object to Secretary Knox's interpretation of the treaty.

It would seem, therefore, that the British Government is estopped to deny the correctness of Secretary Knox's interpretation of the treaty, since no exception has been taken to such interpretation and presumably no subsisting cause of difference was left unsettled when vessels began to pass through the Canal.

Since estoppels are more or less technical, their scope should probably be restricted to the exact matter affected. If this is done in the instant case, even though an estoppel is established, Great Britain might claim that it was restricted to the matter of exemption from the payment of tolls and not necessarily extended to the claim of exemption from considering the tonnage of such vessels in fixing toll rates, since no mention of this question is made by Secretary Knox. In fact, the difficulties mentioned by him would not be present in the consideration of the tonnage of Government vessels in fixing toll rates, for a reasonable amount could be set aside to cover the defense of the Canal, as distinguished from the defense of the United States, should this be deemed a proper charge in determining what was a just and equitable rate.

This leads us to a consideration of another clause in Article III, which bears upon the subject of just and equitable rates.

2

Just and Equitable Charges

The provision referred to is as follows:

> Such conditions and charges of traffic shall be just and equitable.

This raises the question as to what would be just and equitable charges for the service of passing vessels through the Canal for foreign nations and citizens of all nations.

The British Government has placed the following interpretation upon this clause:

> The purpose of these words was to limit the tolls to the amount representing the fair value of the services rendered, i. e., to the interest on the capital expended and the cost of the operation and maintenance of the Canal. (Letter from the Secretary for Foreign Affairs of Great Britain to Ambassador Bryce, November 14, 1912.)

It may be strongly urged that the argument relating to sovereignty over the Canal Zone disposes of this question also, but, whether it does or not, it is not necessary in this connection to discuss what would be a just and equitable rate, because the facts as they exist at present, show that the rates prescribed are more than just and equitable to other nations, since, upon the basis suggested by Great Britain or any other fair basis of calculation, it costs the United States Government two or three times as much to transfer a vessel through the Canal as it received for such services. (See testimony of Gen. Goethals, Hearings Before Committee on Interstate and Foreign Commerce, House of Representatives, Vol. 1, p. 410 et seq.)

Since the rate fixed by the United States, regardless of how determined is just and equitable, no foreign nation has at this time any right to complain.

II

RELATING TO CONSIDERATION OF TONNAGE IN ESTABLISHING TOLL RATES

For the same reasons that the United States are not required to pay tolls on vessels operated as governmental agencies, they are not required to consider the tonnage of such vessels in connection with the establishment of toll rates.

CONCLUSION

It therefore appears that at present and perhaps for a long time in the future, the passage through the Canal of vessels of war or vessels used as governmental agencies, as distinguished from those engaged in commercial traffic, without either payment of tolls or consideration of their tonnage in fixing rates, does not violate either the provisions of the Hay-Pauncefote Treaty or the Panama Canal Act.

WAR DEPARTMENT,
Washington, July 14, 1931.

The GOVERNOR OF THE PANAMA CANAL,
Balboa Heights, Canal Zone.

DEAR SIR: There is inclosed herewith a copy of a letter addressed to me by the President under date of the 9th instant, together with a copy of the opinion from the Acting Attorney General received therewith, dated the 8th instant, holding that the U. S. S. PROCYON while being operated by the State of New York as a training ship of a nautical school may be exempted from the payment of tolls when passing through the Panama Canal. You are accordingly authorized and directed to permit the passage of the

U. S. S. PROCYON through the Panama Canal without payment of tolls, and to permit the free passage in the future of vessels in similar status.

Yours very truly,

PATRICK J. HURLEY,
Secretary of War.

Inclosures:
Copy of President's ltr. 7–9–31;
Copy of Actg. Atty. Gen's. opinion 7–8–31.

THE WHITE HOUSE,
Washington, July 9, 1931.

The Honorable The SECRETARY OF WAR,
Washington, D. C.

MY DEAR MR. SECRETARY: Please find enclosed herewith an opinion from the Attorney General. I would be glad if the War Department would act in accordance therewith.

Yours faithfully,

HERBERT HOOVER.

JULY 8, 1931.

The PRESIDENT,
The White House.

MY DEAR MR. PRESIDENT: I have the honor to comply with your request of June 11 for my advice and opinion on the question whether authority exists in or may be granted to the Governor of the Panama Canal to permit the passage of the U. S. S. PROCYON through the Panama Canal free of tolls. The PROCYON is a vessel of the Navy which the Secretary of the Navy contemplates furnishing to the State of New York to be used as a training ship of a nautical school in accordance with the provisions of the Act of March 4, 1911, c. 265, 36 Stat. 1353 (U. S. C. Title 34, secs. 1121–1123). The ques-

tion is whether this vessel is or may be exempt from the payment of toll while being operated by the State of New York. The letter from the Secretary of the Navy to the Secretary of War dated June 4, 1931, of which you sent me a copy, states that this vessel is owned by the Federal Government, which contributes a considerable portion of its cost of maintenance, that it is not engaged in commercial traffic, and that the benefits of its operation accrue to the American merchant marine at large and thereby to the country as a whole.

Two questions arise. The first is whether the United States is obligated by the provision of any treaty to collect a toll on the passage of this vessel through the Panama Canal.

I have asked the Department of State for an expression of its views upon the possible bearing of any treaty on the question. The Acting Secretary has written me that he is of the opinion that no treaty prevents such exemption. His conclusion is supported by a memorandum prepared by the Counselor of the Department of State on October 16, 1914, for the use of the President, in regard to the effect of the Hay-Pauncefote Treaty of 1901. I agree that neither this treaty nor any other treaty of which I am aware prevents the exemption of this vessel from the payment of toll.

The second question is whether any statute prevents such exemption. The Panama Canal Act, approved August 24, 1912, c. 390, 37 Stat. 560, 562, as amended by the Act of June 15, 1914, c. 106, 38 Stat. 385 (U. S. C. Title 48, sec. 1315), contains the following provisions:

> The President is authorized to prescribe and from time to time change the tolls that shall be levied by the Government of the United States

for the use of the Panama Canal: *Provided,* That no tolls, when prescribed as above, shall be changed, unless six months' notice thereof shall have been given by the President by proclamation.

Tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce. The rate of tolls may be lower upon vessels in ballast than upon vessels carrying passengers or cargo. When based upon net registered tonnage for ships of commerce the tolls shall not exceed $1.25 per net registered ton, nor be less than 75 cents per net registered ton, subject, however, to the provisions of article 19 of the convention between the United States and the Republic of Panama, entered into November 18, 1903. If the tolls shall not be based upon net registered tonnage, they shall not exceed the equivalent of $1.25 per net registered ton as nearly as the same may be determined, nor be less than the equivalent of 75 cents per net registered ton. The toll for each passenger shall not be more than $1.50.

The Act does not expressly prohibit or provide for the exemption of any vessel from the payment of toll, and it was originally thought that tolls should be collected upon the passage of all vessels, without excepting vessels of the United States Navy. But Attorney General Gregory advised President Wilson in an informal memorandum of June 3, 1915, "to the effect that vessels operated by the United States, including warships, naval tenders, colliers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, are not required to pay tolls either under the provisions of the Panama Canal Act or of the Hay-Pauncefote Treaty." Since that time, I am informed

that vessels within the above mentioned category have not been required to pay tolls. There is no reason why the exemption may not be extended to a vessel like the PROCYON, which is owned by the United States Government and is not engaged in commercial traffic.

There remains for consideration the question whether the Governor of the Panama Canal now has authority to permit its passage through the Canal free of toll. The Proclamations of President Taft and President Wilson in regard to the tolls to be paid by vessels using the Panama Canal indicate that such vessels should pay tolls, and I am informed that in practice they are so construed at the present time. As the power over tolls is vested in the President, you may authorize the Governor of the Panama Canal to exempt this vessel and similar vessels from the payment of tolls. In 1915 such authorization was apparently effected by an informal letter from the President to the Secretary of War. The action taken at that time is a precedent for a similar form of authorization in the matter now under consideration, and I consequently advise you that if you desire to make such an authorization, it will not be necessary for you to give notice thereof by proclamation or otherwise.

Respectfully,

JOHN LORD O'BRIAN,
Acting Attorney General.

APPENDIX B

PANAMA CANAL COMPANY,
OFFICE OF THE PRESIDENT,
Balboa Heights, Canal Zone, March 26, 1958.

Memorandum to Secretary, Panama Canal Company:

In reply to your radio NR 51 of March 25, which states in part that the Grace Line brief says that the Panama Canal Company uses its annual report of the Board of Directors to the Stockholder as an official report and conceals certain statistical information, I submit the following explanatory remarks.

In the last paragraph of the narrative section of the 1957 annual report to the Stockholder (page 13), I state as follows:

> It is impossible to include comprehensive coverage of the Company's varied operations and major activities of the Board of Directors in a brief report of this type. We have, therefore, presented here only the highlights of the year's operations and the principal financial reports and operating statistics which follow. More detailed information will be presented in the regular agency report which will be published at a later date.

This statement certainly refutes the idea that the Company represents the report to the Stockholder as its official report and conceals certain statistical information.

The annual report to the Stockholder was first issued for fiscal year 1956 as a result of repeated requests from the Company's Board of Directors for a summary of the year's operations prior to the time

that the regular agency report could be prepared and printed. Distribution to various committees of Congress, heads of various Government agencies and principal shipping companies that use the Canal has materially lessened demands for statistical and financial information and we have had an appreciative response from those who have received the report.

The regular agency report which is printed later in the year is still the official statistical and financial report of the Panama Canal Company/Canal Zone Government agencies. This report contains expanded reports of financial operations and detailed statistical analyses that provide a continuous historical record of Canal operations through the entire period since its establishment in 1914. This detailed agency report is printed as a public document and is mailed free of charge as the official agency report to a wide distribution list, including the principal shipping companies that utilize the Panama Canal. In addition, copies are readily available through the Superintendent of Documents in Washington, D. C.

W. E. POTTER, *President.*

U. S. GOVERNMENT PRINTING OFFICE: 1958